

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

|                            |   |   |
|----------------------------|---|---|
| In Re:                     | ) | <b>Case No. 20-40349-elm11</b>          |
|                            | ) |   |
| EVENTIDE CREDIT            | ) | Fort Worth, Texas                       |
| ACQUISITIONS, LLC,         | ) | June 9, 2020                            |
|                            | ) | 9:30 a.m. Docket                        |
| Debtor.                    | ) |   |
|                            | ) | RENDER RULING - CONSUMER                |
|                            | ) | BORROWERS' MOTION FOR AN ORDER          |
|                            | ) | DISMISSING THE DEBTOR'S                 |
|                            | ) | CHAPTER 11 CASE OR, IN THE              |
|                            | ) | ALTERNATIVE, FOR ABSTENTION             |
|                            | ) | (#123)                                  |
|                            | ) |   |
| EVENTIDE CREDIT            | ) | <b>Adversary Proceeding 20-4008-elm</b> |
| ACQUISITIONS, LLC,         | ) |   |
|                            | ) |   |
| Plaintiff,                 | ) | RENDER RULING - CONSUMER                |
|                            | ) | BORROWERS' MOTION TO DISMISS            |
| v.                         | ) | (#82)                                   |
|                            | ) |   |
| GALLOWAY, ET AL.,          | ) |   |
|                            | ) |   |
| Defendants.                | ) |   |
|                            | ) |   |
| EVENTIDE CREDIT            | ) | <b>Adversary Proceeding 20-4030-elm</b> |
| ACQUISITIONS, LLC,         | ) |   |
|                            | ) |   |
| Plaintiff,                 | ) | RENDER RULING - MOTION TO               |
|                            | ) | DISMISS ADVERSARY PROCEEDING            |
| v.                         | ) | FOR LACK OF SUBJECT MATTER              |
|                            | ) | JURISDICTION (#18)                      |
| BIG PICTURE LOANS, LLC;    | ) |   |
| ASCENSION TECHNOLOGIES,    | ) |   |
| LLC; AND TRIBAL ECONOMIC   | ) |   |
| DEVELOPMENT HOLDINGS, LLC, | ) |   |
|                            | ) |   |
| Defendants.                | ) |   |
|                            | ) |   |

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE EDWARD L. MORRIS,  
UNITED STATES BANKRUPTCY JUDGE.

1 TELEPHONIC APPEARANCES:

2 For the Debtor-Plaintiff: Bethany D. Simmons  
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5 For the Debtor-Plaintiff: Jeff P. Prostok  
6 FORSHEY & PROSTOK, LLP  
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(817) 877-8855

8 For Ascension Technologies, Toby L. Gerber  
9 LLC; Big Picture Loans, Steve A. Peirce  
LLC; and Tribal Economic Scott Drake  
10 Development Holdings, LLC: Nick Hendrix  
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11 2200 Ross Avenue, Suite 3600  
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13 For Ascension Technologies, Justin Gray  
LLC: Big Picture Loans, Anna Bruty  
14 LLC: and Tribal Economic ROSETTE, LLP  
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16 For the Consumer James Paul Muenker  
17 Borrower Defendants: Patrick J. Neligan, Jr.  
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19 (214) 840-5340

20 For the Consumer Leonard Anthony Bennett  
Borrowers: CONSUMER LITIGATION ASSOCIATES  
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22 Newport News, VA 23601  
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23 For the Consumer Michael Allen Caddell  
24 Borrowers: CADDELL & CHAPMAN  
628 East 9th Street  
25 Houston, TX 77007  
(713) 751-0400

TELEPHONIC APPEARANCES, cont'd.:

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(214) 767-1075

For the Official Committee Gary Howard Leibowitz  
of Unsecured Creditors: Irving E. Walker  
Harry "H.C." Jones III  
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transcript produced by transcription service.

1                   FORT WORTH, TEXAS - JUNE 9, 2020 - 9:32 A.M.

2                   THE COURT: All right. Good morning, everybody.

3 We're on the June 9, 2020 9:30 a.m. docket. We have the  
4 Eventide Credit Acquisitions, LLC case, Case 20-40349; the  
5 Eventide Credit Acquisitions, LLC versus Galloway, et al.  
6 case, Adversary No. 20-4008; and the Eventide Credit  
7 Acquisitions, LLC versus Big Picture Loans, et al. case,  
8 Adversary No. 20-4030.

9                   Even though this is for purposes of rendering a ruling on  
10 a number of matters, let me go ahead and at least entertain  
11 the opportunity for appearances for counsel that wish to make  
12 them. Let me start with counsel for the Debtor.

13                  MR. PROSTOK: Good morning, Your Honor. Jeff Prostok  
14 for the Debtor.

15                  THE COURT: All right. Good morning, Mr. Prostok.

16                  MS. SIMMONS: Good morning, Your Honor. Bethany  
17 Simmons; Loeb & Loeb, LLP; for the Debtor as well.

18                  THE COURT: All right. Good morning to you. All  
19 right. Do I have anybody on behalf of the Consumer Borrower  
20 Group?

21                  MR. MUENKER: Good morning, Your Honor. James  
22 Muenker and Pat Neligan for the Consumer Borrowers.

23                  THE COURT: All right. Good morning to both of you.

24                  MR. CADDELL: Good morning, Your Honor. Mike Caddell  
25 for the Consumer Borrowers.

1 THE COURT: All right. Good morning. Do we have  
2 anybody else?

3 MR. BENNETT: Good morning, Judge. This is --

4 THE COURT: Go ahead.

5 MR. BENNETT: Yes, sir. This is Leonard Bennett for  
6 the Consumer Borrowers, Judge.

7 THE COURT: All right. Any additional appearances on  
8 behalf of the Consumer Borrowers?

9 All right. How about for the -- what we've commonly  
10 referred to as the Tribal Defendants: Big Picture Loans,  
11 Ascension Technologies, and Tribal Economic Development  
12 Holdings?

13 MR. DRAKE: Good morning, Your Honor. This is Scott  
14 Drake from Norton Rose Fulbright. I have my colleagues Toby  
15 Gerber and Steve Peirce, and also our co-counsel from the  
16 Rosette firm, Justin Gray and Anna Bruty.

17 THE COURT: All right. Good morning to all of you.  
18 How about for the Committee?

19 MR. LEIBOWITZ: Good morning, Your Honor. Gary  
20 Leibowitz of Cole Schotz on behalf of the Committee. And I  
21 have my colleagues Irving Walker and H.C. Jones on as well.

22 THE COURT: Good morning to you all. And then how  
23 about for Matt Martorello?

24 MR. PHELAN: Your Honor, Robin Phelan for Matt  
25 Martorello.

1 THE COURT: All right. Do we have any other counsel  
2 that wish to make a live appearance for today's proceeding?

3 MS. SCHMIDT: Good morning, Your Honor. Erin Schmidt  
4 for the U.S. Trustee.

5 THE COURT: Good morning, Ms. Schmidt.

6 MS. SCHMIDT: Thank you.

7 THE COURT: All right. Any other parties?

8 All right. Very good.

9 Before the Court for determination are four motions: two  
10 in the main Bankruptcy Case, Case No. 20-40349, which I'll  
11 simply refer to as the "Bankruptcy Case," one in Adversary  
12 Proceeding No. 20-4008, which I'll refer to as "Adversary  
13 4008," and one in Adversary Proceeding No. 20-4030, which  
14 I'll refer to as "Adversary 4030."

15 Specifically before the Court in the Bankruptcy Case are  
16 the following motions. First, there is a motion for an order  
17 dismissing the Debtor's Chapter 11 case, or in the  
18 alternative, for abstention, filed at Docket #123 by a group  
19 of 34 individuals who collectively refer to themselves as the  
20 "Consumer Borrowers." I'll refer to this motion as the  
21 "Bankruptcy Dismissal Motion" and refer to this group of  
22 Movants as the "Consumer Borrowers."

23 Both Eventide Credit Acquisitions, LLC, or the "Debtor"  
24 for short, the Chapter 11 Debtor in the Bankruptcy Case, and  
25 Matt Martorello, or "Martorello" for short, the Debtor's

1 president and a significant indirect equity owner of the  
2 Debtor, have filed a response in opposition to the Bankruptcy  
3 Dismissal Motion, the Debtor's response at Docket #148 and  
4 Martorello's response at Docket #149.

5 The Official Committee of Unsecured Creditors, or the  
6 "Committee" for short, has filed a Memorandum in Support of  
7 the Bankruptcy Dismissal Motion at Docket #151, to which  
8 Martorello has filed a response at Docket #172.

9 Finally, the Consumer Borrowers have filed a reply to the  
10 responses in opposition to the Bankruptcy Dismissal Motion at  
11 Docket #177.

12 The Bankruptcy Dismissal Motion was heard by the Court on  
13 May 28, 2020.

14 Second, there is a Motion for Entry of Interim and Final  
15 Orders pursuant to 11 U.S.C. Sections 105, 362, 363, 364, and  
16 507, Bankruptcy Rules 2002, 4001, 6004, and 9014: (1)  
17 authorizing the Debtor-in-Possession to obtain postpetition  
18 financing; (2) granting liens and providing administrative  
19 expense status; and (3) granting related relief, filed at  
20 Docket #153 by the Debtor, as supplemented by the Notice of  
21 Filing of Proposed Amended and Restated Debtor-in-Possession  
22 Financing and Security Agreement filed at Docket #181. I'll  
23 refer to this motion, as supplemented, as the "Financing  
24 Motion."

25 Both the Committee and the Consumer Borrowers have filed

1 an objection to the Financing Motion, the Committee's  
2 objection at Docket #168 and the Consumer Borrowers'  
3 objection at Docket #207.

4 The Financing Motion was heard by the Court on May 29,  
5 2020.

6 Third, in Adversary 4008, there is the Motion to Dismiss  
7 filed at Docket #82 in Adversary 4008 by the Consumer  
8 Borrowers, who are all of the remaining defendants in the  
9 action. I'll refer to this motion, along with the Consumer  
10 Borrowers' Memorandum in Support at Docket #83 in Adversary  
11 4008, as the "Adversary 4008 Dismissal Motion."

12 The Debtor has filed its objection to the motion at  
13 Docket #86 in Adversary 4008. The Consumer Borrowers have  
14 filed their reply at Docket #93 in Adversary 4008.

15 The Adversary 4008 Dismissal Motion was heard by the  
16 Court on May 28, 2020.

17 Finally, in Adversary 4030, there is the Specially-  
18 Appearing Tribal Defendants' Motion to Dismiss for Lack of  
19 Subject Matter Jurisdiction filed at Docket #18 in Adversary  
20 4030 by the Defendants Tribal Economic Development Holdings,  
21 LLC, or "TED" for short; Big Picture Loans, LLC, or "Big  
22 Picture" for short; and Ascension Technologies, LLC, or  
23 "Ascension" for short, and together with TED and Big Picture,  
24 collectively referred to as the Tribal Defendants. I'll  
25 refer to this motion along with the Tribal Defendants' brief



1 and appendix in support filed at Docket #19 and #21 in  
2 Adversary 4030, respectively, as the "Adversary 4030  
3 Dismissal Motion."

4 The Debtor has filed its objection to the motion at  
5 Docket #26 in Adversary 4030. The Tribal Defendants have  
6 filed their reply at Docket #29 in Adversary 4030.

7 The Adversary 4030 Dismissal Motion was heard by the  
8 Court on June 4, 2020.

9 Having now considered the Bankruptcy Dismissal Motion,  
10 the Financing Motion, the Adversary 4008 Dismissal Motion,  
11 the Adversary 4030 Dismissal Motion, the respective  
12 previously-referenced responses, statements of position,  
13 objections and replies, as applicable to each of the  
14 aforementioned motions, the evidence introduced at the  
15 hearings conducted on May 28th and 29th and June 4th, 2020,  
16 the arguments of counsel, and all prior proceedings before  
17 the Court in the Bankruptcy Case, Adversary 4008, and  
18 Adversary 4030, the Court now issues its findings and  
19 conclusions as applicable in relation to the Bankruptcy  
20 Dismissal Motion, Financing Motion, Adversary 4008 Dismissal  
21 Motion, and Adversary 4030 Dismissal Motion.

22 Starting with the Bankruptcy Dismissal Motion, in  
23 particular, and Jurisdiction. The Court has jurisdiction  
24 over the Bankruptcy Dismissal Motion pursuant to 28 U.S.C.  
25 Sections 1334 and 157 and the order of reference of the

1 United States District Court for the Northern District of  
2 Texas. Venue is proper in this district pursuant to 28  
3 U.S.C. Sections 1408 and 1409. The proceeding constitutes a  
4 core proceeding within the meaning of 28 U.S.C. Section  
5 157(b) (2) (A) and (O) .

6 Factual Background. In one way or another, each of the  
7 matters pending before the Court relates to litigation that  
8 was initiated by or against the Debtor or parties affiliated  
9 with the Debtor prior to the Debtor's Chapter 11 bankruptcy  
10 filing on January 28, 2020. Therefore, it is helpful to  
11 understand the background and nature of each of the parties  
12 involved in the disputes before the Court in order to equally  
13 understand the context in which the prepetition litigation  
14 arose.

15 A. Martorello, Bellicose, and the Business Relationship  
16 Established with the LVD Tribe.

17 Martorello, being the ultimate architect of the business  
18 that led to organization of the Debtor, has a strong  
19 financial background. He is a graduate of the University of  
20 Illinois with a double major in finance and accounting.  
21 Following graduation, he started his career in institutional  
22 corporate bond sales with Smith Barney in its investment  
23 banking analyst program.

24 After a couple of years with Smith Barney, he worked for  
25 a few different proprietary trading firms, and thereafter he

1 rejoined a group of folks with whom he had interned at Arthur  
2 Anderson who had moved to the transaction services group of  
3 KPMG. During his roughly two-year stint at KPMG, Martorello  
4 worked on a variety of transaction services projects, mainly  
5 around asset-based lending, private equity buyouts, and  
6 mergers and acquisitions.

7 In or around 2008, however, Martorello decided to shift  
8 gears and transition from a service provider within the  
9 financial services industry to a business owner/entrepreneur  
10 within the industry. In particular, having learned of the  
11 success that certain of his investment banker colleagues had  
12 had in putting together a consumer lending business that was  
13 eventually bought out, Martorello leveraged his own  
14 experience in the financial field in developing an online  
15 consumer lending business focused on servicing operations  
16 that utilized the same type of artificial intelligence and  
17 algorithm creation strategies that he had been exposed to in  
18 securities trading. Ultimately, this culminated in the  
19 creation of a business named aPriori Solutions in Chicago.

20 In mid-2011, Martorello sought to capitalize on a tax  
21 incentive program offered in the U.S. Virgin Islands and  
22 effectively reconstituted the aPriori Solutions business  
23 within a new Virgin Islands entity named Bellicose VI, Inc.,  
24 or "Bellicose VI" for short.

25 Following the organization of Bellicose VI, the Lac Vieux

1 Desert Band of Lake Superior Chippewa Indians, or the "Tribe"  
2 for short, with the assistance and guidance of Bellicose VI,  
3 began to conduct an online lending business through its  
4 wholly-owned subsidiary, Red Rock Tribal Lending, LLC, or  
5 "Red Rock" for short.

6 In this regard, on or about October 25, 2011, Bellicose  
7 VI and Red Rock entered into a servicing agreement. See  
8 Consumer Borrowers' May 28 Hearing Exhibit 1.

9 As reflected by the servicing agreement, Red Rock had the  
10 exclusive right at that time to "develop and operate the  
11 Tribe's financial services business that will provide small-  
12 denomination short-term financial services and other related  
13 goods and services to consumers through its Internet call  
14 center and field representative operations." See *id.*,  
15 Section 1.2.2.

16 It was the Tribe's intention, through Red Rock, to  
17 "engage in Internet-based unsecured lending." See *id.*,  
18 Section 1.2.3.

19 Thus, with this in mind, pursuant to the services  
20 agreement, Red Rock sought to "retain and engage the  
21 Servicer" -- defined as Bellicose VI -- "as its independent  
22 contractor to consult to, develop, manage, and provide  
23 operational guidelines regarding the unsecured lending  
24 business and any expansion thereof."

25 The term of the agreement was until the end of 2018, with

1 the opportunity for renewal.

2 The Tribe subsequently also offered consumer loans  
3 through a second subsidiary named Duck Creek Financial, LLC,  
4 or "Duck Creek" for short. Duck Creek also entered into a  
5 servicing agreement with Bellicose VI.

6 Bellicose VI would eventually enter into other business  
7 opportunities as well, organizing separate subsidiaries to  
8 carry on each particular business. For example, it had a  
9 proprietary trading subsidiary, a subsidiary that provided  
10 financing to a casino boat, and a subsidiary that did a salt  
11 lease deal with a travel casino.

12 In the case of the business that it conducted with the  
13 Tribe and its subsidiaries, in 2012, Bellicose VI organized  
14 SourcePoint VI, LLC, or "SourcePoint" for short, to carry on  
15 the business, and assigned all of its rights under the  
16 servicing agreements with Red Rock and Duck Creek to  
17 SourcePoint.

18 In or around mid-2013, the New York State Department of  
19 Financial Services, or the "NYDFS," began to take enforcement  
20 actions against various tribal entities, including the Tribe  
21 and its subsidiaries, to prevent what it asserted as  
22 impermissible usurious consumer lending. This led to the  
23 initiation of litigation by the Tribe and a number of other  
24 tribal entities against the NYDFS and its Superintendent in  
25 August 2013 to try to prevent their interference with tribal

1 lending operations, which the tribal entities asserted were  
2 not subject to New York's lending laws and regulations. See  
3 *generally* Civil Action No. 1:13-CV-05930-RJS, in the United  
4 States District Court for the Southern District of New York.

5 Their request for preliminary injunctive relief was  
6 denied by the District Court in September 2013, and the order  
7 denying relief was subsequently upheld on appeal.

8 Having encountered this potential impediment to the  
9 online lending business, the Tribe, Martorello, and other  
10 owners of Bellicose VI began to explore the possibility of  
11 the Tribe's acquisition of Bellicose VI and SourcePoint so as  
12 to bring in-house all aspects of the lending business.

13 With the buyout potential in play, in January 2014, the  
14 Martorello team made another change in location, this time to  
15 Puerto Rico, in order to obtain the benefit of the capital  
16 gains tax exemption available to residents of Puerto Rico.  
17 Bellicose Capital, LLC, or "Bellicose Capital" for short, was  
18 then organized as the new parent holding company of Bellicose  
19 VI.

20 B. Organization, Ownership, and Prepetition Control of  
21 the Debtor.

22 Thereafter, on February 9, 2015, the Debtor was organized  
23 as a Delaware limited liability company for the purpose of  
24 serving as the special-purpose vehicle through which  
25 consideration for the sale would be received. See Consumer

1 Borrowers' May 28 Hearing Exhibit 9.

2 With respect to ownership of the Debtor, the economic and  
3 equity interest membership interests in the Debtor, being the  
4 financial membership interests in the Debtor, were issued as  
5 follows: 59.5 percent to Kairos Holding, LLC, which later  
6 became Breakwater Holding, LLC, so I'll simply refer to this  
7 entity as "Breakwater;" 25.5 percent to Gallant Capital, LLC,  
8 or "Gallant" for short; 10 percent to Martorello's brother,  
9 Justin Martorello, who I'll refer to as "Justin;" and the  
10 remaining 5 percent split up among Brian McFadden, James  
11 Dowd, and Simon Liang, who I'll collectively refer to as the  
12 "Settling Eventide Members." See *id.*, Schedule A. See also  
13 Consumer Borrowers' May 28 Hearing Exhibit 22.

14 Providing further color to the Debtor's ownership  
15 structure, both Gallant and Breakwater have connections to  
16 Martorello. First, in the case of Gallant, the 25.5 percent  
17 owner of the Debtor, Martorello acknowledged that he is its  
18 majority owner and he signed the proof of claim filed by  
19 Gallant in the Bankruptcy Case as its Manager. See Consumer  
20 Borrowers' May 28 Hearing Exhibit 27.

21 Second, in the case of Breakwater, the 59.5 percent owner  
22 of the Debtor, Breakwater is a Cook Islands limited liability  
23 company wholly-owned by the Bluetech Irrevocable Trust,  
24 formerly known as the M. Martorello Irrevocable Trust, which  
25 I'll refer to as "Bluetech" or the "Bluetech Trust" for

1 short.

2 Pursuant to the terms of the trust instrument governing  
3 the Bluetech Trust, the Trust Fund committed to the Trust is  
4 administered by a trustee for the benefit of so-called  
5 Discretionary Beneficiaries who have been identified on a  
6 schedule to the instrument, and any additional Discretionary  
7 Beneficiaries who the Protector of the Bluetech Trust may  
8 nominate, provided they are not Excluded Persons. See  
9 Committee's May 28 Hearing Exhibit 13.

10 Martorello acknowledged that he is both the Settlor and  
11 the Protector of the Bluetech Trust, and that the current  
12 Discretionary Beneficiaries are his family members. Excluded  
13 Persons include, among others, all court, administrative, or  
14 judicial bodies, except for the court, administrative, or  
15 judicial bodies organized and empowered under the laws of the  
16 Cook Islands, and any and all creditors, claimants, and  
17 judgment creditors of, among others, any Settlor or any  
18 Discretionary Beneficiary. See *id.*

19 With respect to management and control of the Debtor, the  
20 operating agreement of the Debtor provides that the business  
21 and affairs of the company shall be managed by or under the  
22 direction of a Manager who may exercise all powers of the  
23 company and do all such lawful acts and things as are not, by  
24 statute, the certificate of formation, or the operating  
25 agreement, directed or required to be exercised and done by



1 the members having a right to vote. See Consumer Borrowers'  
2 May 28 Hearing Exhibit 9.

3 (Proceedings interrupted by power surge, 9:52 a.m. to  
4 9:55 a.m.)

5 THE COURT: All right. Can anybody hear us?

6 (Chorus of assents.)

7 THE COURT: Let me just do a quick roll call. Do we  
8 have counsel for the Debtor?

9 MS. SIMMONS: Yes, Your Honor.

10 THE COURT: All right. Do we have counsel for the  
11 Consumer Borrower Group?

12 MR. BENNETT: Yes, Your Honor.

13 THE COURT: All right. Counsel for the Tribal  
14 Defendants?

15 MR. DRAKE: We're here, Your Honor.

16 THE COURT: Counsel for the Committee?

17 MR. LEIBOWITZ: We're here, Your Honor.

18 THE COURT: Counsel for Mr. Martorello?

19 MR. PHELAN: We're here, Your Honor.

20 THE COURT: All right. And I feel like I'm  
21 forgetting somebody.

22 MS. SCHMIDT: Erin Schmidt for the U.S. Trustee is  
23 still on the line.

24 THE COURT: Ah, yes, Ms. Schmidt. That's it. All  
25 right. So, --

1 MR. PHELAN: I didn't hear Mr. Prostok.

2 THE COURT: Okay. Do we have -- do we have Mr.  
3 Prostok?

4 (No response.)

5 MS. SIMMONS: Your Honor, this is Bethany Simmons  
6 from Loeb & Loeb also on behalf of the Debtor. I just  
7 emailed Mr. Prostok to see if he was still on or able to  
8 rejoin.

9 (Court confers with Clerk.)

10 THE COURT: Okay. And I'm sorry. It's Ms. Simmons,  
11 right?

12 MS. SIMMONS: (garbled)

13 THE COURT: I just didn't hear you completely. Did  
14 you send a note, did you say, to Mr. Prostok to try to dial  
15 back in?

16 MS. SIMMONS: Yes, Your Honor. I sent him a note  
17 just to tell him that we were back on and to dial back in.

18 THE COURT: All right. Perfect. We'll give him a  
19 second.

20 (Pause, 9:57 a.m. to 9:58 a.m.)

21 THE COURT: While we're waiting to see if he can  
22 rejoin, just so that you all know what happened: We had a  
23 very strange power surge in the building and literally lost  
24 all the power in the courtroom and everything, for just a  
25 second. But it literally killed all of our systems. So, --

1 (Court confers with Clerk.)

2 THE COURT: We just received a note that Mr. Prostok  
3 should be dialing in right now.

4 (Court confers with Clerk.)

5 THE COURT: Oh. All right. We just heard that this  
6 was a city-wide matter.

7 All right. Do we have Mr. Prostok?

8 MR. PROSTOK: I am here, Your Honor.

9 THE COURT: All right. Very good. I was just  
10 explaining: We apparently had some city-wide surge. We  
11 thought it was just here in the building, but apparently it  
12 was city-wide, and it killed our system. So, now for the  
13 trick of trying to figure out where we dropped off.

14 MR. PHELAN: Your Honor, I think it was right when  
15 you said Breakwater was owned by Bluetech, and then you  
16 started to talk about the beneficiaries.

17 THE COURT: All right. So let's do this. I'll start  
18 here.

19 Providing further color to the Debtor's ownership  
20 structure, both Gallant and Breakwater have connections to  
21 Martorello. First, in the case of Gallant, the 25.5 percent  
22 owner of the Debtor, Martorello acknowledged that he is its  
23 majority owner and he signed the proof of claim filed by  
24 Gallant in the Bankruptcy Case as its Manager. See Consumer  
25 Borrowers' May 28 Hearing Exhibit 27.

1       Second, in the case of Breakwater, the 59.5 percent owner  
2 of the Debtor, Breakwater is a Cook Islands limited liability  
3 company wholly-owned by the Bluetech Irrevocable Trust,  
4 formerly known as the M. Martorello Irrevocable Trust, which  
5 I'll refer to as "Bluetech" or the "Bluetech Trust" for  
6 short.

7       Pursuant to the terms of the trust instrument governing  
8 the Bluetech Trust, the Trust Fund committed to the Trust is  
9 administered by a trustee for the benefit of so-called  
10 Discretionary Beneficiaries who have been identified on a  
11 schedule to the instrument, and any additional Discretionary  
12 Beneficiaries who the Protector of the Bluetech Trust may  
13 nominate, provided they are not Excluded Persons. See  
14 Committee's May 28 Hearing Exhibit 13.

15       Martorello acknowledged that he is both the Settlor and  
16 the Protector of the Bluetech Trust, and that the current  
17 Discretionary Beneficiaries are his family members. Excluded  
18 Persons include, among others, all court, administrative, or  
19 judicial bodies, except for the court, administrative, or  
20 judicial bodies organized and empowered under the laws of the  
21 Cook Islands, and any and all creditors, claimants, and  
22 judgment creditors of, among others, any Settlor or any  
23 Discretionary Beneficiary. See *id.*

24       With respect to management and control of the Debtor, the  
25 operating agreement of the Debtor provides that the business

1 and affairs of the company shall be managed by or under the  
2 direction of a Manager who may exercise all powers of the  
3 company and do all such lawful things -- I'm sorry, do all  
4 such lawful acts and things as are not, by statute, the  
5 certificate of formation, or the operating agreement,  
6 directed or required to be exercised and done by the members  
7 having a right to vote. See Consumer Borrowers' May 28  
8 Hearing Exhibit 9, Section V.A.

9 The Manager, in turn, has the power to appoint and remove  
10 officers. See *id.*, Section V.B(ii).

11 Under the terms of the operating agreement, however, the  
12 Manager can be removed with or without cause by the vote or  
13 written consent in lieu of a meeting of the members holding a  
14 majority of the voting interests of the Debtor. See *id.*,  
15 Section V.E.

16 Thus, ultimately, the Manager may be removed or  
17 overridden at any time by the holder or holders of a majority  
18 of the voting membership interests of the Debtor. I'll come  
19 back to this in a minute.

20 At the time of the Debtor's formation, Liant, LLC, or  
21 "Liant" for short, was appointed as the initial Manager of  
22 the Debtor. See *id.*, Section V.A.

23 Martorello was the president of Liant, and Liant, as the  
24 Manager of the Debtor, appointed Martorello as president of  
25 the Debtor, an officer position that Martorello continues to

1 hold.

2 Later, James Walesa would come to be appointed as Manager  
3 of the Debtor, but effective January 16, 2020, he resigned,  
4 and on January 17, 2020, Drew McManigle, or "McManigle" for  
5 short, was appointed as the new Manager. See Consumer  
6 Borrowers' May 28 Hearing Exhibit 26.

7 McManigle is the founder and managing director of MACCO  
8 Restructuring Group, LLC, or "MACCO" for short.

9 Circling back to the voting members of the Debtor, at all  
10 times one hundred percent of the voting membership interests  
11 of the Debtor have been held by Breakwater. See Consumer  
12 Borrowers' May 28 Hearing Exhibit 9, Schedule A.

13 Thus, at all times, the Manager has served at the  
14 pleasure of and could be overridden by Breakwater.

15 Breakwater is also manager-managed. Its Manager is ATP  
16 Directors Limited, an offshore entity. See Consumer  
17 Borrowers' May 28 Hearing Exhibit 21, last page of attached  
18 MACCO Restructuring Group engagement letter.

19 Tine Fa'asili Ponia, or "Ponia" for short, is a purported  
20 authorized officer of ATP Directors Limited. Separately,  
21 with respect to Bluetech, Breakwater's one hundred percent  
22 owner, Bluetech's trustee is Guardian Trust Corporation, a  
23 Cook Islands corporation. Guardian Trust Corporation's  
24 officers include the offshore entities ATP Directors Limited  
25 and ATP Secretaries Limited. See Committee's May 28 Hearing

1 Exhibit 13 at Page 25.

2 C. Sale of the Bellicose Servicing Business to the  
3 Tribe.

4 Ultimately, the Tribe agreed with the owners of Bellicose  
5 Capital to acquire the servicing business of Bellicose  
6 Capital by way of a multistep transaction. First, all of the  
7 assets directly or indirectly held by Bellicose Capital  
8 unrelated to the business of the Tribe were separated from  
9 Bellicose Capital, and the assets of SourcePoint were moved  
10 into Bellicose Capital.

11 Then the following documents were executed to effectuate  
12 the transaction: First, an agreement and plan of merger  
13 among LVD Tribal Acquisition Company, LLC, or "TAC" for  
14 short, as Acquiror, an entity wholly-owned and operated by  
15 the Tribe; the Debtor as Seller; and Bellicose Capital as the  
16 target company. See Debtor's May 28 Hearing Exhibit 14. See  
17 also Consumer Borrowers' May 28 Hearing Exhibit 11.

18 Second, a Loan and Security Agreement executed by TED,  
19 and together with its Subsidiaries, as defined therein,  
20 referred to as Borrower, and the Debtor, as Lender, such  
21 agreement referred to as the LSA. See Debtor's May 28  
22 Hearing Exhibit 12.

23 Third, a secured promissory note dated January 26, 2016,  
24 executed by TED, the wholly-owned subsidiary of the Tribe, in  
25 favor of the Debtor, referred to as the "Promissory Note."

1 See Debtor's May 28 Hearing Exhibit 11.

2 And fourth, a parental guaranty and sovereign immunity  
3 waiver executed by the Debtor as Lender and the Tribe, TED,  
4 and all Subsidiaries, as defined therein, including, without  
5 limitation, Big Picture and Ascension, such document referred  
6 to as the "Guaranty." See Debtor's May 28 Hearing Exhibit  
7 13.

8 As a result of the transaction, which, as mentioned,  
9 closed on or about January 26, 2016, the lending business  
10 previously conducted by Red Rock and Duck Creek was taken  
11 over by Big Picture; the servicing business previously  
12 conducted by Bellicose VI and SourcePoint was taken over by  
13 Ascension; and TED, being the parent holding company of both  
14 Big Picture and Ascension, committed to make payments to the  
15 Debtor under the terms of the LSA and complex waterfall  
16 provisions of the Promissory Note for a period of seven  
17 years, secured by the Collateral as defined in the LSA, which  
18 consists of, among other things, substantially all of the  
19 personal property of the Tribal Defendants.

20 Focusing on the Promissory Note specifically. The  
21 waterfall provisions of the Promissory Note implement what  
22 amounts to a net profits interest in the lending operations  
23 of Big Picture and Ascension for a period of seven years. As  
24 such, any action taken by Big Picture and/or Ascension that  
25 could negatively impact their profitability could conceivably



1 also negatively impact payments to the Debtor on its *de facto*  
2 net profits interest. This becomes relevant in later  
3 discussing the settlement agreed upon by the Tribal  
4 Defendants.

5 D. The Prepetition Consumer Borrower Litigation and  
6 Tentative Class Action Settlement with the Tribal Entities,  
7 Individuals Affiliated with the Tribal Entities, the Settling  
8 Eventide Members, and Certain Third Parties.

9 This, then, now takes me to the Consumer Borrowers.  
10 Beginning in June 2017, several actions were commenced  
11 against the Tribe and certain of its subsidiaries -- the  
12 Tribe and such affiliates, as applicable, collectively and  
13 generically referred to as the "Tribal Entities;" various  
14 individuals affiliated with the Tribal Entities; the Debtor,  
15 and various individuals and entities affiliated with the  
16 Debtor, including, without limitation, Martorello. Briefly,  
17 the actions are as follows:

18 One, Lula Williams, et al., on behalf of themselves and  
19 all individuals similarly situated versus certain Tribal  
20 Entities, Martorello, and certain individuals affiliated with  
21 the Tribal Entities, Civil Action No. 3:17-CV-461, filed in  
22 the U.S. District Court for the Eastern District of Virginia  
23 on June 22, 2017. See Consumer Borrowers' May 28 Hearing  
24 Exhibit 38; Debtor's May 28 Hearing Exhibit 32. I'll refer  
25 to this case as the "Williams I Case."

1 Two, Renee Galloway, et al., as individuals and as  
2 representatives of the classes versus certain Tribal Entities  
3 and Martorello, Civil Action No. 3:18-CV-406, filed in the  
4 U.S. District Court for the Eastern District of Virginia on  
5 June 11, 2018. See Consumer Borrowers' May 28 Hearing  
6 Exhibit 35; Debtor's May 28 Hearing Exhibit 34. I'll refer  
7 to this case as the "Galloway I Case."

8 Three, Richard Lee Smith, Jr., individually and on behalf  
9 of persons similarly situated, versus certain Tribal  
10 Entities, Martorello, and the Debtor, Civil Action No. 3:18-  
11 CV-1651, filed in the U.S. District Court for the District of  
12 Oregon on September 11, 2018. See Consumer Borrowers' May 28  
13 Hearing Exhibit 43; Debtor's May 28 Hearing Exhibit 36. I'll  
14 refer to this case as the "Smith Case."

15 Four, Dana Duggan, individually and on behalf of persons  
16 similarly situated, versus certain Tribal Entities, certain  
17 individuals affiliated with the Tribal Entities, Martorello,  
18 and the Debtor, Civil Action No. 1:18-CV-12277, filed in the  
19 U.S. District Court for the District of Massachusetts on  
20 October 31, 2018. See Consumer Borrowers' May 28 Hearing  
21 Exhibit 44; Debtor's May 28 Hearing Exhibit 38. I'll refer  
22 to this case as the "Duggan Case."

23 Five, Lula Williams, et al. versus Martorello and certain  
24 additional third parties, Civil Action No. 3:19-CV-85, filed  
25 in the U.S. District Court for the Eastern District of

1 Virginia on February 11, 2019. See Debtor's May 28 Hearing  
2 Exhibit 41. I'll refer to this case as the "Williams II  
3 Case."

4 Six, Renee Galloway, et al., as individuals and as  
5 representatives of the classes, versus the Debtor, certain  
6 individuals and entities affiliated with the Debtor and  
7 Martorello, and certain additional third parties, Civil  
8 Action No. 3:19-CV-314, filed in the U.S. District Court for  
9 the Eastern District of Virginia on April 24, 2019. See  
10 Consumer Borrowers' May 28 Hearing Exhibit 36; Debtor's May  
11 28 Hearing Exhibit 43. I'll refer to this case as the  
12 "Galloway II Case."

13 And seven, Renee Galloway, et al., as individuals and as  
14 representatives of the classes, versus certain individuals  
15 affiliated with the Tribal Entities, Civil Action No. 3:19-  
16 CV-470, filed in the U.S. District Court for the Eastern  
17 District of Virginia on June 26, 2019. See Consumer  
18 Borrowers' May 28 Hearing Exhibit 37. I'll refer to this  
19 case as the "Galloway III Case."

20 I'll collectively refer to the Williams I, Galloway I,  
21 Smith, Duggan, Galloway II, and Galloway III Cases as the  
22 "Class Action Cases," and collectively refer to the Class  
23 Action Cases and the Williams II Case as the "Consumer  
24 Borrower Cases."

25 Of relevance in each of the Eastern District of Virginia

1 cases -- namely, the Williams I, Galloway I, Williams II,  
2 Galloway II, and Galloway III Cases -- the same United States  
3 District Judge has been assigned.

4 In very general terms, in each of the Class Action Cases,  
5 the Plaintiffs have brought claims individually and on behalf  
6 of a purported class of similarly-situated individuals  
7 against the respective Defendants therein for, among other  
8 things, violation of various consumer lending protection laws  
9 and the Racketeer Influenced and Corrupt Organizations Act,  
10 or "RICO" for short.

11 In the Williams II Case, the Plaintiffs have brought  
12 individual claims against the Defendants therein for  
13 violations of the Fair Credit Reporting Act.

14 Again, in very general terms, the claims against  
15 Martorello, the Debtor, and individuals and entities  
16 affiliated with the Debtor are predicated on  
17 "rent-a-tribe"-type allegations, effectively claiming that  
18 such Defendants entered into agreements with the Tribal  
19 Entities to use them as a vehicle to profit from usurious  
20 loans made to consumers that are purportedly immune from  
21 attack under tribal lending laws and the Tribal Entities'  
22 sovereign immunity.

23 Indeed, in the Williams I Case, the first of the Class  
24 Action Cases filed, the Tribal Entities sought the dismissal  
25 of claims against them on the basis of tribal immunity. In

1 June 2018, the District Judge denied the motion and the  
2 Tribal Entities appealed. See Consumer Borrowers' May 28  
3 Hearing Exhibit 38, Docket Entries for Docket #124 and #135.

4 Leading up to and after the appeal, the parties were  
5 embroiled in extensive and seemingly nasty discovery  
6 disputes. See generally Consumer Borrowers' May 28 Hearing  
7 Exhibit 38.

8 Just a cursory review of the docket in the case reflects  
9 the magnitude and expansiveness of the disputes. While the  
10 Tribal Entities and Martorello requested that the case be  
11 stayed pending the outcome of the appeal, the Court denied  
12 the request insofar as involving parties other than the  
13 Tribal Entities and issues other than the sovereign immunity  
14 issues on appeal. See, for example, *id.*, Docket #323.

15 Separately, each of the Smith, Duggan, and Galloway III  
16 Cases was initiated against, among others, various Tribal  
17 Entities and/or individuals affiliated with the Tribal  
18 Entities.

19 On June 7, 2019, the Plaintiffs in the Williams I and  
20 Galloway I Cases filed a motion with the United States  
21 Judicial Panel on Multi-District Litigation for the transfer  
22 of, among other cases, the Smith and Duggan Cases to the U.S.  
23 District Court for the Eastern District of Virginia for  
24 centralized, consolidated pretrial proceedings. The MDL  
25 proceeding was assigned Case MDL No. 2906, which I'll refer

1 to as the "MDL Proceeding."

2 The Plaintiffs thereafter also added the Galloway III  
3 Case to the list.

4 On July 22, 2019, the Debtor, Martorello, and certain  
5 other individuals and entities affiliated with the Debtor  
6 filed their joint opposition to the motion. See Consumer  
7 Borrowers' May 28 Hearing Exhibit 40.

8 The principal basis for the opposition was the  
9 Respondents' assertion that the Plaintiffs had found a judge  
10 in the Eastern District of Virginia who is favorably disposed  
11 toward them, and thus that the request was nothing more than  
12 a "thinly-veiled exercise in forum shopping, nothing more."  
13 See *id.* at Page 2. See also Consumer Borrowers' May 28  
14 Hearing Exhibit 41.

15 In the midst of this, on July 3, 2019, the Fourth Circuit  
16 Court of Appeals issued an opinion reversing the District  
17 Court's denial of the Tribal Entities' motion to dismiss in  
18 Williams I and remanding the case with instructions to grant  
19 the Tribal Entities' motion to dismiss for lack of subject  
20 matter jurisdiction on tribal immunity grounds. See Debtor's  
21 May 28 Hearing Exhibit 23.

22 While the Circuit Court's mandate was effective July 25,  
23 2019, for reasons unknown to the Court, the District Court  
24 did not dismiss the Tribal Entities from the case at that  
25 time. See Consumer Borrowers' May 28 Hearing Exhibit 38.

1           Consequently, on August 12, 2019, the Tribal Entities  
2       filed a motion for entry of judgment based upon the Fourth  
3       Circuit's opinion. *See id.*

4           However, again, for unknown reasons, the motion was not  
5       immediately acted upon by the Williams I court, and, in fact,  
6       would not be granted until February 18, 2020.

7           Separately, on September 19, 2019, the motion to transfer  
8       in the MDL Proceeding was withdrawn and the MDL Proceeding  
9       was closed. *See* MDL Proceeding Docket #63 and #64.

10          Ultimately, a framework for a settlement among all the  
11       Plaintiffs in the Consumer Borrower Cases, individually and  
12       as representatives of the putative classes of similarly-  
13       situated individuals that they represented, as applicable, on  
14       the one hand, and the Tribal Entities, individuals affiliated  
15       with the Tribal Entities, and certain others, including the  
16       Settling Eventide Members, on the other hand, came together.

17          The tentative settlement was first announced to the  
18       Williams I court on or about October 21, 2019. *See* Consumer  
19       Borrowers' May 28 Hearing Exhibit 38.

20          To effectuate the class settlement aspects of the  
21       settlement, the settling parties needed all of the settling  
22       parties and associated claims to be consolidated within one  
23       action. The parties selected Galloway III, which up to that  
24       point in time had only been filed against various individuals  
25       affiliated with the Tribal Entities, to serve as the

1 consolidated action.

2 Accordingly, on November 26, 2019, the Williams III --  
3 I'm sorry -- the Galloway III Case Plaintiffs filed a motion  
4 to amend their class action complaint to add the Plaintiffs  
5 and Settling Defendants from all the other Consumer Borrower  
6 Cases. See Galloway III Case Docket #16 and #17.

7 On December 2, 2019, an order was entered granting the  
8 motion, and the amended complaint was filed the next day. See  
9 Galloway III Case Docket #20 and #23.

10 Not long after, the formal Class Action Settlement  
11 Agreement and Release had been executed by all of the  
12 Settling Parties, which I'll refer to as the "Settlement  
13 Agreement." See Consumer Borrowers' May 28 Hearing Exhibit  
14 12.

15 E. Prepetition Actions Taken by the Debtor in an Effort  
16 to Prevent Consummation of the Settlement.

17 Under the terms of the settlement, subject to class  
18 certification and approval of the class settlement, Big  
19 Picture and Ascension are to (a) fund \$8.7 million into the  
20 settlement fund to be created; (b) collect no more than 2.5  
21 times the original principal amount of any outstanding loans  
22 owed by settling class members; and (c) cease efforts to  
23 collect on charged-off loans owed by settling class members.

24 According to the Debtor, Components B and C equate to  
25 roughly \$11 million in value. Thus, according to the Debtor,



1 consummation of the settlement could have a negative impact  
2 of up to \$20 million in relation to the Debtor's *de facto* net  
3 profits interest under the Promissory Note.

4       Consequently, following announcement of the settlement,  
5 the Debtor began to undertake multiple actions in an effort  
6 to derail the settlement. First, on December 16, 2019, the  
7 Debtor commenced an action against each of the Tribal  
8 Defendants, as well as the Tribe and TAC -- collectively, the  
9 "Arbitral Defendants" -- before the American Arbitration  
10 Association. See Consumer Borrowers' May 28 Hearing Exhibit  
11 13; Tribal Defendant's June 4 Hearing Exhibit 27.

12       Pursuant to the arbitration demand, the Debtor had  
13 asserted claims for breach and anticipatory breach of the  
14 LSA; breach and anticipatory breach of the Promissory Note;  
15 breach of the Guaranty; breach of fiduciary duty; and request  
16 for declaratory judgment relief determining the existence of  
17 certain past defaults under the LSA and determining that the  
18 Arbitral Defendants' execution of the Settlement Agreement  
19 constitutes a default under the LSA.

20       Second, on December 17, 2019, the day after initiating  
21 the arbitration, the Debtor filed a verified complaint for  
22 injunctive relief against the Tribal Defendants in the United  
23 States District Court for the Western District of Michigan.  
24 See Tribal Defendants' June 4 Hearing Exhibit 33. I'll refer  
25 to this case as the "Michigan Injunction Case."

1 In the Michigan Injunction Case, the Debtor requested  
2 entry of an injunction enjoining the Tribal Defendants from  
3 entering into the Settlement Agreement.

4 Third, on December 18, 2019, the next day, the Debtor  
5 filed a motion to intervene in the Galloway III Case.

6 None of these strategies proved to be sufficiently  
7 expedient to the Debtor. First, in the case of the  
8 arbitration, while the Debtor has aggressively pursued  
9 prosecution of the action, trial is not scheduled until late  
10 July or early August 2020.

11 Second, in the case of the Michigan Injunction Case, the  
12 Michigan District Court denied the Debtor's motion for a TRO,  
13 determining, among other things, that "it is far from clear  
14 that Plaintiff" -- referring to the Debtor -- "is likely to  
15 prevail on the merits, given the very complicated financial  
16 and legal set of circumstances between the parties," that  
17 "[u]nder the complex circumstances presented, the assertions  
18 of future irreparable harm are tenuous at best" and that the  
19 Court was "not persuaded by Plaintiff's argument that public  
20 policy strongly favors injunctive relief, given the policies  
21 in favor of arbitration and the enforcement of contractual  
22 agreements." See Tribal Defendants' June 4 Hearing Exhibit  
23 34.

24 In fact, as to the public policy point, the Court added  
25 that "The public policy in favor of arbitration and

1 enforcement of contracts between sophisticated business  
2 parties in the circumstances presented is far outweighed by  
3 the public policy favoring the equitable and expeditious  
4 settlement of mass consumer class action litigation." See  
5 *id.* at Page 4.

6 Finally, with respect to the Debtor's motion to intervene  
7 filed in Galloway III, to this day the Court has not ruled on  
8 the motion. In fact, notwithstanding the filing of the  
9 motion on December 18, 2019, the Eastern District of Virginia  
10 District Court entered a preliminary approval order as to the  
11 Settlement Agreement on December 20, 2019. See Debtor's May  
12 28 Hearing Exhibit 50.

13 F. The Litigation Heats Back Up Against Martorello, the  
14 Debtor, and Other Affiliated Non-Settling Defendants. The  
15 Debtor Pivots to Bankruptcy.

16 On January 8, 2020, an identical order was entered in  
17 each of the Williams I, Galloway I, and Galloway II Cases  
18 lifting the stay of proceedings that had been ordered upon  
19 the announcement of a settlement in principle and  
20 establishing deadlines to "proceed expeditiously to resolve  
21 the Plaintiff's claims against the Non-Settling Defendants."  
22 See Consumer Borrowers' May 28 Hearing Exhibit 39.

23 Thus, in the face of both the Settlement Agreement and  
24 the remaining litigation moving forward and the Michigan  
25 District Court's denial of injunctive relief, on January 28,

1 2020, the Debtor initiated the Bankruptcy Case with the  
2 filing of its voluntary petition for relief under Chapter 11  
3 of the Bankruptcy Code.

4 While the bankruptcy filing had the effect of  
5 automatically staying the Galloway II, Smith, and Duggan  
6 Cases, it did not automatically stay Williams I, Galloway I,  
7 Williams II, or, of most significance to the Debtor, Galloway  
8 III. Consequently, the very next day, on January 29, 2020,  
9 the Debtor commenced Adversary 4008 to pursue injunctive  
10 relief against both the Consumer Borrowers and the Tribal  
11 Defendants under Sections 362 and 105 of the Bankruptcy Code.  
12 See Adversary 4008 Docket #1.

13 In the Debtor's complaint, the Debtor defined the  
14 "Pending Actions" as Williams I, Galloway I, Smith, Duggan,  
15 Williams II, Galloway II, and Galloway III, and the Debtor  
16 requests, pursuant to Bankruptcy Code Sections 362(a)(1) and  
17 (a)(3), the issuance of declaratory relief to purportedly  
18 stay the Consumer Borrowers from prosecuting any of their  
19 claims in the Pending Actions until completion of the  
20 Debtor's restructuring process, and pursuant to Bankruptcy  
21 Code Section 105, the issuance of an injunction against all  
22 parties barring the continued prosecution of the Pending  
23 Actions until completion of the Debtor's restructuring  
24 process.

25 On the same day as filing Adversary 4008, the Debtor also

1 filed a motion for preliminary declaratory and/or injunctive  
2 relief. See Adversary 4008 Docket #2.

3 G. Other Activity in the Bankruptcy Case to Date.

4 For nearly a month, nothing took place in the Bankruptcy  
5 Case outside of the previously-mentioned filing of Adversary  
6 4008, the filing of a request for an extension of time to  
7 file the Debtor's Schedules and Statement of Financial  
8 Affairs, and the filing of applications to retain counsel.  
9 See generally Debtor's May 28 Hearing Exhibit 5.

10 Meanwhile, outside of bankruptcy, on February 14, 2020,  
11 in the case of the Smith and Duggan Cases, and on February  
12 21, 2020 in the case of the Williams I and Galloway I Cases,  
13 Martorello filed motions to transfer to the Northern District  
14 of Texas based upon the existence of the Bankruptcy Case.  
15 See Consumer Borrowers' May 28 Hearing Exhibits 35, 38, 43,  
16 and 44.

17 Similarly, on February 21, 2020, Breakwater, Bluetech,  
18 Gallant, and Justin and Rebecca Martorello also filed a  
19 motion to transfer Galloway II to the Northern District of  
20 Texas based upon the existence of the Bankruptcy Case. See  
21 Consumer Borrowers' May 28 Hearing Exhibit 36.

22 All of the motions to transfer venue filed in the Eastern  
23 District of Virginia have been denied. The motions in the  
24 Districts of Oregon and Massachusetts remain pending.

25 Focusing back on the Bankruptcy Case, following the

1 United States Trustee's appointment of the Committee, which  
2 Martorello has pejoratively referred to as a "pretend  
3 committee," and the Committee's engagement of counsel, the  
4 Debtor suddenly filed an emergency motion on February 26,  
5 2020 for the entry of an order shortening the time within  
6 which proofs of claim could be filed in the Bankruptcy Case  
7 and permitting national notice by publication to be given of  
8 the bar date, in light of the pending class actions. See  
9 Bankruptcy Case Docket #33.

10 In the words of the Debtor, "The purpose of this motion  
11 is to shorten the time by which the Debtor can be confident  
12 that all legitimate claims are accounted for and can  
13 therefore propose a confirmable plan." See *id.* at Page 4,  
14 Paragraph 10.

15 Both the Committee and certain Consumer Borrowers  
16 objected to the motion, raising concerns about the shortness  
17 of time for the filing of proofs of claim proposed under the  
18 motion, and, more significantly, the unspecified notice by  
19 publication proposed. See Bankruptcy Case Docket #40 and  
20 #43.

21 Ultimately, the Court agreed to shorten the claims bar  
22 date by a little bit to May 8, 2020, but denied the request  
23 for approval of notice by publication without prejudice,  
24 understanding that the Debtor would be submitting a  
25 definitive proposal after further consultation with the

1 Committee. See Bankruptcy Case Docket #68.

2 Ultimately, no request was ever made, and the potential  
3 exists that there are putative class members with claims who  
4 have not been provided notice of the claims bar date.

5 Separately, the Debtor also filed on February 26, 2020 an  
6 application to employ McManigle of MACCO as Manager and Chief  
7 Restructuring Officer of the Debtor, effective as of the  
8 bankruptcy filing. See Consumer Borrowers' May 28 Hearing  
9 Exhibit 21.

10 Despite having no employees and no operations outside of  
11 collecting funds under the Promissory Note and pursuing and  
12 defending litigation, the Debtor explained that the Debtor  
13 "came to the conclusion that it was critical to engage a  
14 crisis management firm and a CRO to manage its business  
15 through the restructuring process." See *id.* at Page 3,  
16 Paragraph 5.

17 McManigle's proposed role would include making  
18 operational decisions, including those which will or  
19 potentially will affect operations, contracting, accounting,  
20 collection of accounts, cash and cash disbursements, and all  
21 similar business undertakings; manage and control cash, cash  
22 outflows, and financing commitments; negotiate with the  
23 Debtor's creditors; evaluate and make recommendations and  
24 decisions in connection with strategic alternatives to  
25 maximize the value of the Debtor; and make any and all

1 business decisions on behalf of the Debtor, as necessary and  
2 required, utilizing the Manager's and CRO's business  
3 judgment. See *id.* at Pages 4-5.

4 On March 27, 2020, the Court entered an order authorizing  
5 the engagement. See Committee's May 28 Hearing Exhibit 3.

6 Despite McManigle's appointment as the Manager of the  
7 Debtor prior to the bankruptcy filing, despite the  
8 description provided to the Court in requesting approval of  
9 McManigle's postpetition engagement as Manager and CRO of the  
10 Debtor, and despite the promised independence and critical  
11 role that McManigle would play in connection with the case,  
12 the following is significant to note:

13 One. McManigle never personally met with Martorello, the  
14 Debtor's president and only other officer, prior to his  
15 engagement.

16 Two. Despite executing one of the prepetition unsecured  
17 Promissory Notes made payable to Bluetech, McManigle was not  
18 involved in any discussions or negotiations concerning the  
19 Promissory Note.

20 Three. McManigle never spoke to any of the Debtor's  
21 members about the Chapter 11 filing prior to signing the  
22 bankruptcy petition.

23 Four. McManigle's only communication with anyone  
24 employed by an entity in the chain of control of the Debtor  
25 has been with Tine Ponia, a purported authorized officer of



1 the offshore entity ATP Directors Limited, which manages,  
2 directly or indirectly, Breakwater and Bluetech, both Cook  
3 Islands entities.

4 Five. McManigle has had no direct communications with  
5 any representatives of the Tribe or the Tribal Defendants.

6 And six. As of May 28, 2020, McManigle has never spoken  
7 to Martorello directly and doesn't even know what he does for  
8 the Debtor.

9 After obtaining a shortening of the claims bar date, the  
10 Debtor was focused back on the Tribal Defendants, filing a  
11 second lawsuit against them under Adversary Proceeding No.  
12 20-4014, which I'll refer to as "Adversary 4014." Pursuant  
13 to the complaint in Adversary 4014, and despite the pendency  
14 of the arbitration involving breach of contract claims  
15 between the parties, which the Debtor was and is continuing  
16 to actively prosecute, the Debtor sought to compel the Tribal  
17 Defendants to make payments under the Promissory Note via  
18 turnover relief under Bankruptcy Code Section 542.

19 Similar to Adversary 4008, the Debtor also sought  
20 emergency preliminary injunctive relief in an effort to  
21 effectively prevent the Tribal Defendants from consummating  
22 the Settlement Agreement pending the outcome of the  
23 arbitration.

24 Ultimately, the Court dismissed the claims asserted  
25 against the Tribal Defendants in both Adversary 4008 and

1 Adversary 4014 for want of jurisdiction on tribal immunity  
2 grounds. See Tribal Defendants' June 4 Hearing Exhibits 35  
3 and 36.

4 On April 24, 2020, the day after the Consumer Borrowers  
5 filed the Bankruptcy Dismissal Motion, the Debtor filed yet  
6 another lawsuit against the Tribal Defendants, this time  
7 under Adversary 4030. The complaint in Adversary 4030  
8 asserts claims of breach of contract largely mirroring  
9 assertions currently being litigated in the pending  
10 arbitration and seeking preliminary injunctive relief to both  
11 compel payments under the Promissory Note and prevent  
12 consummation of the Settlement Agreement pending conclusion  
13 of the arbitration.

14 On May 15, 2020, the Debtor filed a motion for an  
15 extension of the exclusivity periods of Bankruptcy Code  
16 Section 1121 for the filing of a Chapter 11 plan and  
17 obtaining confirmation of the plan. See Bankruptcy Case  
18 Docket #152.

19 Pursuant to the motion, the Debtor claims that an  
20 extension is warranted and appropriate because a decision in  
21 the arbitration is not expected to be issued until mid-  
22 September 2020, and according to the Debtor, if the Debtor is  
23 successful in obtaining an award, the award will allegedly  
24 provide the Debtor with the information that it needs to  
25 project recoveries to legitimate creditors in the case. See

1 *id.* at Page 2.

2 On the same date, the Debtor filed the Financing Motion  
3 to request authority to obtain postpetition financing in the  
4 amount of \$2 million from Bluetech, the indirect 59.5 percent  
5 owner of the Debtor through Breakwater and the entity in sole  
6 control of the Debtor through Breakwater as the Debtor's one  
7 hundred percent voting member. The financing is proposed to  
8 be used almost exclusively if not exclusively for the payment  
9 of professional fees and expenses, particularly litigation  
10 fees and expenses.

11 Despite Bluetech's prepetition agreement to provide \$1.25  
12 million in financing to the Debtor on an unsecured basis at a  
13 maximum non-default interest rate of three percent per annum,  
14 see Committee's May 28 Hearing Exhibits 4 and 5, pursuant to  
15 the Financing Motion, as amended, the terms of the financing  
16 would include: (1) a \$150,000 origination fee payable to  
17 Bluetech; (2) a \$200,000 exit fee payable to Bluetech; (3) a  
18 success fee of two percent of "any settlement or award at the  
19 arbitration;" (4) interest on the outstanding principal  
20 balance at 12 percent per annum; (5) the payment of all  
21 actual out-of-pocket expenses of Bluetech; (6) security in  
22 the form of a lien in all assets of the Debtor and proceeds  
23 thereof, with the exception of Chapter 5 claims; (7) a  
24 maturity of the earliest of one year, consummation of a sale  
25 of all or any portion of the Debtor's assets, the effective

1 date of a plan, dismissal of the Bankruptcy Case, or the date  
2 of termination of the DIP loan commitments and acceleration  
3 under the DIP financing agreement; and (8) the  
4 acknowledgement that Bluetech has not and is not subjecting  
5 itself to the jurisdiction of this Court in the event of any  
6 disputes or otherwise.

7 Of note, McManigle never communicated with Bluetech, its  
8 trustee, the Guardian Trust Corporation, or anyone else on  
9 behalf of the DIP Lender with respect to the DIP financing,  
10 McManigle was not involved in any negotiations with respect  
11 to the terms of the DIP loan, and McManigle was totally  
12 unaware of Bluetech's refusal to submit to the jurisdiction  
13 of the Court until it was pointed out by the Committee's  
14 counsel. See also Bankruptcy Case Docket #85, Bluetech's  
15 Objection to the Committee's Motion for a Bankruptcy Rule  
16 2004 Examination of Bluetech, on the basis of, among other  
17 things, lack of personal jurisdiction, noting that the Cook  
18 Islands are not party to the Hague Convention.

19 Even more troubling, in connection with the Financing  
20 Motion hearing, no evidence was presented of any negotiation  
21 at all with Bluetech with respect to the terms of the DIP  
22 financing.

23 H. The Debtor's Assets and Claims Asserted in the Case.

24 Turning next to the Debtor's assets and liabilities, as  
25 of the date of the bankruptcy filing, the Debtor scheduled

1 assets with a value of \$60,437,205.34 and total claims of  
2 \$7,643,567.14. See Consumer Borrowers' May 28 Hearing  
3 Exhibit 17 at Page 9.

4 On the asset side of the equation, the Debtor has  
5 assigned a value of \$60,180,386.87 to the Promissory Note and  
6 amounts payable thereunder, the Debtor's primary asset.  
7 Scheduled claims are for the \$1.25 million in prepetition  
8 unsecured loans made by Bluetech to the Debtor; unpaid fees  
9 and expenses of counsel; a disputed claim of nearly \$4.575  
10 million to TED associated with advance Promissory Note  
11 payments made by TED to the Debtor prepetition; a \$115,000  
12 claim of Liant; and a few nominal claims of third parties.

13 Turning to filed proofs of claim, 36 Consumer Borrowers  
14 or other borrowers or putative class members have filed  
15 proofs of claim, aggregating roughly \$100,000. All or  
16 substantially all of the claims, however, also reference one  
17 or more of the class action cases and reference class claims  
18 in an unliquidated amount to be determined. See generally  
19 Bankruptcy Case Claims Register. See also Consumer  
20 Borrowers' May 28 Hearing Exhibit 23.

21 Separately, unliquidated claims have also been filed by  
22 Gallant, Liant, Martorello, Justin and Rebecca Martorello,  
23 and Dowd, in each case predicated on the indemnity provisions  
24 of the Debtor's operating agreement. The IRS has filed a  
25 claim for \$400. And the law firm of Armstrong Teasdale has

1 filed a claim for \$2,719,064.

2 Beginning on May 27, 2020, the day before the hearing on  
3 the Consumer Borrowers' Bankruptcy Dismissal Motion, and  
4 continuing into May 28, 2020, objections to each of the  
5 Consumer Borrower proofs of claim were filed by the Debtor  
6 and Martorello. Each of the objections of the Debtor and  
7 Martorello, respectively, are substantially identical in  
8 content. See Bankruptcy Case Docket #180, #183-185, #187-  
9 206, and #208-255.

10 Of note, neither McManigle nor anyone else at MACCO  
11 reviewed or undertook any analysis of any of the proofs of  
12 claim objected to prior to the filing of the claims  
13 objections.

14 Discussion.

15 A. Statutory Grounds and the Parties' Respective  
16 Positions.

17 Dismissal in Chapter 11 is governed by Section 1112 of  
18 the Bankruptcy Code. In particular, Section 1112(b) (1)  
19 provides, in relevant part: On request of a party in  
20 interest, and after notice and a hearing, the Court shall  
21 convert a case under this chapter to a case under Chapter 7,  
22 or dismiss a case under this chapter, whichever is in the  
23 best interest of creditors and the estate, for cause, unless  
24 the Court determines that the appointment under Section  
25 1104(a) of a trustee or an examiner is in the best interests

1 of creditors and the estate. See 11 U.S.C. Section  
2 1112(b)(1).

3 Here, the Consumer Borrowers assert that cause exists for  
4 dismissal of the Bankruptcy Case under Section 1112(b)(1)  
5 based upon the Debtor's alleged lack of good faith in  
6 commencing the Bankruptcy Case. In particular, the Consumer  
7 Borrowers argue that the Debtor has simply attempted to  
8 utilize the Bankruptcy Code as a litigation tactic and/or to  
9 forum shop, with no true objective to reorganize.

10 The Consumer Borrowers also rely upon the factors  
11 identified by the Fifth Circuit in *Little Creek Development*  
12 *Company v. Commonwealth Mortgage Corp. (In re Little Creek*  
13 *Development Company)*, 779 F.2d 1068 (5th Cir. 1986) for  
14 indicia of bad faith.

15 Alternatively, the Consumer Borrowers request suspension  
16 of the Bankruptcy Case on abstention grounds, whereby the  
17 Consumer Borrowers are permitted to liquidate their claims by  
18 trying one or more so-called bellwether cases in the Eastern  
19 District of Virginia.

20 Suspension of a Bankruptcy Case on abstention grounds is  
21 governed by Section 305 of the Bankruptcy Code. Section 305  
22 provides, in relevant part, "The Court, after notice and a  
23 hearing, may suspend all proceedings in a case under this  
24 title at any time if the interests of creditors and the  
25 debtor would be better served by such suspension." See 11

1 U.S.C. Section 305(a)(1).

2 The Committee has joined the Consumer Borrowers in  
3 requesting the alternative relief of suspension of the  
4 Bankruptcy Case until the Consumer Borrower cases have been  
5 resolved and the Consumer Borrowers' claims against the  
6 Debtor have been liquidated. At hearing, however, the  
7 Committee seemed to also join in the Consumer Borrowers'  
8 request for dismissal.

9 The Debtor responds that in order for the Consumer  
10 Borrowers to succeed on their request for dismissal, they  
11 must establish that the Bankruptcy Case was not filed for any  
12 valid bankruptcy purpose, and the Debtor asserts that the  
13 Consumer Borrowers cannot carry that burden because the  
14 Bankruptcy Case was filed for two valid bankruptcy purposes:  
15 First, to preserve the value of the Promissory Note; and  
16 second, to reduce the duplicative and excessive costs and  
17 distractions of defending litigation in multiple forums.

18 The Debtor asserts that suspension of the Bankruptcy Case  
19 on abstention grounds would present an even worse outcome for  
20 all parties because it would severely burden the estate in  
21 its the ability to pay creditors on account of the  
22 duplicative adjudication of identical claims.

23 Martorello has joined in the Debtor's opposition and  
24 separately filed a response to the Committee's statement of  
25 position, asserting that the Committee is an illegitimate



1 puppet committee comprised of plaintiffs in litigation who  
2 are not focused on attempting to maximize payment to  
3 unsecured creditors.

4 B. Dismissal for Lack of Good Faith.

5 In *Little Creek*, the Fifth Circuit reiterated the  
6 longstanding principle that bankruptcy relief, as an  
7 equitable remedy, is dependent upon a debtor's good faith in  
8 commencing and prosecuting the case. The Court explained,  
9 "Every bankruptcy statute since 1898 has incorporated  
10 literally or by judicial interpretation a standard of good  
11 faith for the commencement, prosecution, and confirmation of  
12 bankruptcy proceedings. Such a standard furthers the  
13 balancing process between the interests of debtors and  
14 creditors which characterizes so many provisions of the  
15 bankruptcy laws and is necessary to legitimize the delay and  
16 costs imposed upon parties to a bankruptcy. Requirement of  
17 good faith prevents abuse of the bankruptcy process by  
18 debtors whose overriding motive is to delay creditors without  
19 benefiting them in any way or to achieve reprehensible  
20 purposes. Moreover, a good faith standard protects the  
21 jurisdictional integrity of the bankruptcy courts by  
22 rendering their powerful equitable weapons available only to  
23 those debtors and creditors with 'clean hands.'" *Little*  
24 *Creek*, 779 F.2d at 1071-72, citations omitted.

25 As such, courts have recognized that a debtor's lack of

1 good faith constitutes cause for dismissal under Section  
2 1112(b) of the Bankruptcy Code. See *id.* at 1072. See also  
3 *Humble Place Joint Venture v. Fory (In re Humble Place Joint*  
4 *Venture)*, 936 F.2d 814, 816-17 (5th Cir. 1991).

5 Lack of good faith is to be determined based upon the  
6 totality of the circumstances. See *In re Mirant Corp.*, No.  
7 03-46590, 2005 WL 2148362, \*6 (Bankr. N.D. Tex. January 26,  
8 2005).

9 As explained by the Fifth Circuit, "Determining whether  
10 the debtor's filing for relief is in good faith depends  
11 largely upon the bankruptcy court's on-the-spot evaluation of  
12 the debtor's financial condition, motives, and the local  
13 financial realities." *Little Creek*, 779 F.2d at 1072. See  
14 also *Mirant Corp.*, 2005 WL 2148362, \*6.

15 As such, findings of lack of good faith are most often  
16 predicated on a conglomerate of factors rather than any one  
17 particular data point. *Little Creek*, 779 F.2d at 1072. See  
18 also *In re Carbaugh*, 299 B.R. 395, 399 (Bankr. N.D. Tex.  
19 2003).

20 In *Little Creek*, for example, the Fifth Circuit explained  
21 that several -- but not necessarily all -- of the following  
22 conditions usually exist in a single-asset real estate case  
23 pursued in bad faith: (1) there are generally no employees  
24 except for the principals; (2) there is little or no cash  
25 flow; (3) there is no available sources of income to sustain

1 a plan of reorganization; (4) there are typically only a few,  
2 if any, unsecured creditors, whose claims are relatively  
3 small; (5) the property of the debtor has usually been posted  
4 for foreclosure because of arrearages and the debtor has been  
5 unsuccessful in defending actions against foreclosure in  
6 state court; and (6) there are sometimes allegations of  
7 wrongdoing by the debtor or its principals.

8 In *Mirant*, Judge Lynn opined that courts may find more  
9 useful the "valid bankruptcy purpose" test to determine good  
10 faith. See *Mirant Corp.*, 2005 WL 2148362, \*7.

11 He quoted the *Integrated Telecom Express* case out of the  
12 Third Circuit for the proposition that valid bankruptcy  
13 purposes may include, for example, preserving going concerns  
14 and maximizing property available to satisfy creditors. See  
15 *id.*

16 In any dismissal proceeding, the proponent of dismissal  
17 must carry the initial burden, placing into question the  
18 debtor's good faith. If satisfied, then the burden then  
19 shifts to the debtor to show that it acted in good faith and  
20 is acting in good faith -- *i.e.*, has a valid purpose in  
21 filing the Bankruptcy Case and prosecuting the Bankruptcy  
22 Case. See *id.* See also *Carbaugh*, 299 B.R. at 399, citing *In*  
23 *re Tamecki*, 229 F.3d 205, 207 (3rd Cir. 2000).

24 Here, based upon a totality of the circumstances, the  
25 Court finds that the Debtor has not filed and prosecuted the

1 Bankruptcy Case in good faith, as evidenced by the following:

2 First, the Debtor is not an operating business. It is a  
3 holding company with no employees that for all practical  
4 purposes owns a single asset, the Promissory Note. Thus,  
5 there is no true going concern operation to preserve.

6 Second, the Bankruptcy Case was clearly filed as the next  
7 step in a strategy to try to find a court willing to  
8 temporarily or permanently prevent the Tribal Defendants from  
9 consummating the Settlement Agreement. In this regard,  
10 having already commenced the arbitration, which has the  
11 ability to determine all contractual claims between the  
12 parties, and after having failed to obtain injunctive relief  
13 from the Michigan District Court, and failed to obtain  
14 intervention in the Galloway III case, the Debtor has  
15 resorted to bankruptcy with the tortured objective of trying  
16 to shoehorn adversary proceeding claims into the narrow  
17 jurisdictional provisions of the LSA, wholly ignoring the  
18 material adverse effect and status quo limitations of the  
19 LSA.

20 And contrary to the Debtor's arguments of filing the  
21 Bankruptcy Case to stop the bleeding and preserve value, the  
22 Bankruptcy Case has been nothing but bleeding, with the  
23 Debtor having already incurred upwards of \$800,000 in  
24 professional fees, predominantly in litigation in three  
25 different adversary proceedings that is duplicative of the

1 arbitration in the case of the Tribal Defendants and which  
2 has, in any event, netted zero beneficial results for the  
3 estate.

4 While a legitimate Chapter 11 proceeding may present new  
5 litigation strategies that do not otherwise exist outside of  
6 bankruptcy, Congress did not intend for Chapter 11 itself to  
7 be a litigation strategy. *See, for example, Mirant*, 2005 WL  
8 2148362, \*8, noting that, "In analyzing the purpose of a  
9 debtor's Chapter 11 petition in the context of a motion to  
10 dismiss for bad faith filing, the courts regularly consider  
11 whether the bankruptcy was intended to obtain tactical  
12 advantage in litigation or negotiations."

13 Third, the Bankruptcy Case was also clearly filed as the  
14 next step in a strategy to try to assist Martorello and  
15 individuals and entities affiliated with Martorello in  
16 finding a way to forum shop away from the District Court in  
17 the Eastern District of Virginia that, for reasons that are  
18 not necessary for the Court to fully comprehend, appears to  
19 be a less than -- the Court, that for reasons that are not  
20 necessarily clear to this Court, appears to be less than  
21 impressed with the positions taken by Martorello in the  
22 litigation.

23 That was very tortured. Let me say that again. Third,  
24 the Bankruptcy Case was also clearly filed as the next step  
25 in a strategy to try to assist Martorello and individuals and

1 entities affiliated with Martorello in finding a way to forum  
2 shop away from the District Court in the Eastern District of  
3 Virginia that, for reasons that are not necessary for this  
4 Court to fully comprehend, appears to be less than impressed  
5 with the positions taken by Martorello in the litigation.

6 Fourth, while I wholeheartedly agree with Debtor's  
7 counsel's argument that bankruptcy may legitimately serve the  
8 purpose of consolidating splintered litigation among multiple  
9 courts and/or cases for the purpose of facilitating  
10 constructive negotiations towards a cost-effective resolution  
11 and/or a restructuring, the Debtor's and Martorello's actions  
12 during the course of the Bankruptcy Case have been about as  
13 antithetical to such objectives as you can get.

14 Initially, while giving lip service to the concept of  
15 developing publication noticing protocol designed to notify  
16 all potential claimants of the Bankruptcy Case and claims bar  
17 date so as to bring all potential consumer borrower claimants  
18 into a centralized forum, no action was ever taken, raising  
19 potentially serious questions with respect to the  
20 effectiveness of any discharge that might be obtained under a  
21 confirmed Chapter 11 plan, given the limited level of notice  
22 provided to creditors and potential creditors.

23 Nevertheless, putting that concern aside, and more  
24 significantly, instead of seeking to openly communicate with  
25 the Committee and work towards a potential global resolution,

1 or at least an agreed-upon protocol that would consolidate  
2 particular issues for resolution in relation to the proofs of  
3 claim that have been filed, Martorello has effectively  
4 resorted to name-calling, and the Debtor, through counsel,  
5 surprisingly and brazenly stated that, to the extent any of  
6 the Consumer Borrowers are ever found to hold any legitimate  
7 allowed claims against the Debtor, the Debtor will simply  
8 separately classify them, apparently previewing the Debtor's  
9 intent to gerrymander a vote on a plan in such instance.

10 Fifth, the Debtor's actions are not being taken under the  
11 direction and control of McManigle as the Debtor's  
12 independent Manager and CRO. Instead, it is clear that the  
13 Cook Islands entity Breakwater, as the one hundred percent  
14 voting member of the Debtor, which in turn is wholly owned by  
15 the Cook Islands entity Bluetech, is directing the actions of  
16 the Debtor, to the exclusion of McManigle.

17 This is evident by virtue of the fact that McManigle had  
18 zero involvement in reviewing the proofs of claim that have  
19 been objected to, zero involvement in any discussions or  
20 negotiations with any of the Tribal Defendants, and perhaps  
21 most shockingly, zero involvement in any discussions or  
22 negotiations with Bluetech as the proposed DIP Lender, who  
23 astoundingly seeks to leverage the Bankruptcy Case to its  
24 benefit while at the same time thumbing its nose at the  
25 concept of subjecting itself to the jurisdiction of this

1 Court in connection with administering the proposed DIP loan.

2 Finally, this is not a case where there is a lack of  
3 financial wherewithal to address liabilities. The Debtor has  
4 scheduled the Promissory Note as having a value in excess of  
5 \$60 million. And importantly, the Tribal Defendants have  
6 never taken the position that the LSA and Promissory Note are  
7 not enforceable. They have simply taken the position that no  
8 payments are owing under the Promissory Note until the  
9 amounts that were previously advanced under the Promissory  
10 Note are recouped.

11 Moreover, to the extent that the Debtor is in need of  
12 funding to preserve the value of the Promissory Note for the  
13 benefit of its owners, it need look no further than Bluetech  
14 and Gallant, who collectively received distributions in  
15 excess of \$13.6 million within the two years preceding the  
16 bankruptcy filing. See Consumer Borrowers' May 28 Hearing  
17 Exhibit 18 at Pages 11-13.

18 As a result of the Debtor's lack of good faith in filing  
19 and prosecuting the Bankruptcy Case, the Court finds that  
20 cause exists for dismissal of the Bankruptcy Case under  
21 Section 1112(b)(1) of the Bankruptcy Code.

22 The Court notes that in reviewing the provisions of  
23 Section 1112(b)(1), the Court also considered whether the  
24 alternative appointment of a trustee or examiner would be in  
25 the best interests of creditors and the estate. While in



1 certain respects the Court found the possibility of an  
2 independent trustee to be appealing, the Court nevertheless  
3 determined that dismissal was in the best interests of  
4 creditors and the estate for two reasons.

5 First, the Consumer Borrowers, being by far and away the  
6 vast majority of the creditors in the case, have clearly  
7 requested dismissal, even in the face of the comments that  
8 the Court made regarding the benefits of Chapter 5 claims in  
9 bankruptcy.

10 Second, the Court has concern that the appointment of a  
11 trustee could present complications in relation to the  
12 Debtor's preparation and prosecution of the upcoming  
13 arbitration. Therefore, for this additional reason, the  
14 Court has found dismissal to be warranted.

15 As a result of the foregoing, the Court now also focuses  
16 on the other pending matters. First, with respect to the  
17 Financing Motion, the Court denies the motion as moot.

18 That said, even if the Bankruptcy Case were not  
19 dismissed, the Court cannot envision any circumstance under  
20 which it would approve DIP financing for litigation costs  
21 from an insider who refuses to subject itself to the  
22 jurisdiction of the Court on the type of terms proposed.

23 Next, with respect to both the Adversary 4008 Dismissal  
24 Motion and the Adversary 4030 Dismissal Motion, inasmuch as  
25 both motions are predicated on the existence of bankruptcy

1 jurisdiction and both cases have not progressed beyond the  
2 dismissal motion stage, the Court finds that both cases  
3 should be dismissed without prejudice under the Fifth Circuit  
4 authority of *Querner v. Querner (In re Querner)*, 7 F.3d 1199  
5 (5th Cir. 1993).

6 All right. That concludes the Court's ruling.

7 Mr. Muenker, if I can look to you to submit a proposed  
8 form of order on the Bankruptcy Dismissal Motion and also on  
9 the Financing Motion. Are you still there?

10 MR. NELIGAN: Your Honor, this is Pat Neligan. We  
11 will get you the order for both.

12 THE COURT: All right. Very good. So if I can --

13 MR. MUENKER: Your Honor, I'm sorry. I had you on  
14 mute. I'm still here. I was talking and couldn't figure out  
15 why no one could hear me.

16 THE COURT: No problem. All right. So if I can look  
17 to you all to prepare orders on those matters, obviously,  
18 circulating them to all of the parties who are represented on  
19 the phone today. And if you'll also take care of preparing a  
20 form of dismissal order without prejudice in the 4008  
21 adversary.

22 Mr. Drake, if I can look to you and your colleagues to  
23 prepare a proposed form of order for dismissal without  
24 prejudice of Adversary 4030 -- again, similarly, circulating  
25 it counsel for the Debtor, at a minimum, and I'd probably go

1 ahead and why don't you circulate that also to Mr. Phelan and  
2 the Committee, Mr. Leibowitz for the Committee.

3 MR. DRAKE: Yes, Your Honor, this is Scott Drake.  
4 We'll take care of that.

5 THE COURT: All right. That concludes the matters on  
6 the --

7 MS. SCHMIDT: Your Honor?

8 THE COURT: -- 9:30 a.m. docket. Are there any other  
9 issues that need to be taken up?

10 MS. SCHMIDT: Your Honor, Erin Schmidt with the U.S.  
11 Trustee's Office. The U.S. Trustee had asked me to, if the  
12 Court had been inclined to dismiss this case, would the Court  
13 consider language in a dismissal order in which the Court  
14 would retain jurisdiction over fees and directing  
15 professionals to file fee applications within a date certain?

16 MR. PROSTOK: I mean, Your Honor, this is the Debtor.  
17 If the case is dismissed, there's no reason to have a fee app  
18 hearing. I mean, I --

19 MS. SCHMIDT: Your Honor, --

20 THE COURT: Go ahead, Ms. Schmidt.

21 MS. SCHMIDT: Your Honor, if I can respond to that.

22 THE COURT: Okay.

23 MS. SCHMIDT: Given the Court's ruling that indicates  
24 that there might have been possible conflicts of interest, we  
25 just thought it was appropriate that -- it may be appropriate

1 for the Court to retain jurisdiction over fees, to determine  
2 whether professionals might have been conflicted during their  
3 representation of the Debtor.

4 MR. PROSTOK: Well, Your Honor, --

5 THE COURT: All right. Well, why don't we do this.  
6 Why don't we, rather than making a call on this on the fly, I  
7 would be interested in seeing any authority that you all  
8 respectively may have on the appropriateness of retention of  
9 jurisdiction in a circumstance like this.

10 So, if I can -- Ms. Schmidt, if I can look to you to  
11 submit something prior to 14 days after the entry of the  
12 dismissal order, to the extent that the U.S. Trustee wishes  
13 for jurisdiction to be retained on a limited basis for the  
14 purposes that you outlined, and then the Debtor and any other  
15 parties in interest would have an opportunity to respond to  
16 that, and then I'll try to get that knocked out quickly so  
17 that things can move on.

18 MS. SCHMIDT: I appreciate that, Your Honor. Thank  
19 you.

20 THE COURT: All right. Very good. That concludes  
21 the matters on the 9:30 a.m. docket. The Court will be in  
22 recess.

23 (Proceedings concluded at 11:03 a.m.)

24 --oOo--

25 ///

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

**/s/ Kathy Rehling**

**06/12/2020**

\_\_\_\_\_  
Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

\_\_\_\_\_  
Date

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